

STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of the Planned Amendment to  
Rules Governing the Regulatory Treatment of  
Competitive Local Exchange Carriers  
(CLECs), Minnesota Rules, Chapters 7811 and  
7812

ISSUE DATE: March 19, 2001

OAH DOCKET NO. 6-2500-13099-1  
PUC DOCKET NO. P-999/R-98-1081

ORDER ADOPTING RULES

**PROCEDURAL HISTORY**

On July 27, 1998, the *State Register* published the Commission's Request for Comments, initiating this docket. 23 S.R. 272-73. Six parties filed comments in response and included requests to participate in an advisory committee.

The Commission convened an advisory committee representing a broad range of affected stakeholder groups. The committee included AT&T Communications of the Midwest, Inc. (AT&T); the Cable Communications Association; FirstCom, Inc.; Global Crossing, Inc. (successor to Frontier); GTE Communications Corporation; Lakedale Communications; MCI WorldCom (MCI); McLeodUSA Telecommunications Services (successor to Dakota Telecom); MediaOne Telecommunications Corp. of MN (MediaOne); the Minnesota Department of Commerce (DOC); the Minnesota Independent Coalition (MIC); the Minnesota Office of Attorney General (OAG-RUD); the Minnesota Senior Federation; Onvoy; Qwest Corporation (successor to US West Communications, Inc.); Seren Innovations, Inc. (Seren); and Sprint Communications Company (Sprint). The Committee met on several occasions to exchange comments and drafts.

Around January 31, 2000, a sub-group of the committee, called the Task Force Sub-Group (now called the Coalition), submitted consensus language on behalf of the Department; OAG-RUD; Advanced Telecommunications, Inc. (now called Eschelon Telecom of Minnesota, Inc.); AT&T; Crystal Communications, Inc. (now called HickoryTech); Global Crossing; McLeod; MCI; MediaOne (now called AT&T); Seren; Sprint; the Telecommunications Resellers Association (now called the Association of Communications Enterprises); and the Competitive Telecommunications Association (CompTel). The Commission approved this language, with minor modifications, for publication in the Commission's notice of intent to adopt rules.

On August 8, 2000, the Commission issued its Statement of Need and Reasonableness (SONAR) supporting the adoption of the proposed rules pursuant to its authority under Minnesota Statutes §§ 216A.05, 237.10, and 237.16.

On August 21, 2000, the *State Register* published the Commission's DUAL NOTICE: Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing If 25 or More Requests for Hearing are Received (Notice of Intent to Adopt Rules). 25 SR 546 - 554.

More than 25 people asked for a hearing on the proposed rules. The Administrative Law Judge (ALJ) convened a hearing on October 5 and 16, 2000. Participants filed post-hearing comments with the ALJ and the Commission on November 3, 2000. The Commission convened a hearing on November 8 to consider party positions, and made changes to its proposed rules. Participants then filed reply post-hearing comments around November 13, 2000.

On December 29, 2000 the Report of the Administrative Law Judge (ALJ's Report) was completed. The report found that the proposed amendments were necessary and reasonable, with two exceptions. As required by statute, the ALJ forwarded his report to the Chief ALJ for review.

On January 3, 2001, the Chief ALJ released the ALJ's Report, together with the Report of the Chief ALJ, supporting the ALJ's Report.

The Commission, with a quorum of its members present, met to consider this matter on February 8 and March 6, 2001.

## **FINDINGS AND CONCLUSIONS**

### **I. ANALYSIS OF ISSUES**

The draft rules are designed to insert identical language into both Minnesota Rules, chapters 7811 (regarding areas served by local exchange carriers (LECs) with fewer than 50,000 subscribers) and 7812 (regarding service in the rest of the state). The two chapters are identical in many respects. Citations to "7811/12" or "7811/7812" refer to the relevant portions of each rule chapter.

#### **A. Scope of regulations (parts 7811/12.2210, subp. 1(A))**

The Commission had proposed to adopt the following language in its rules:

7811/12.2210, COMPETITIVE LOCAL EXCHANGE CARRIERS (CLECs).

Subpart 1 -- General scope of regulation. Competitive local exchange carriers (CLECs) are regulated as provided in this part.

A. The commission shall exercise its regulatory authority over the local services provided by CLECs only to the extent provided for in, or necessary to implement the requirements of, this chapter. Except as provided otherwise in this part or other commission rules, the commission shall exercise its authority over a CLEC's local services only upon complaint under subpart 17 and will not require prior approval of a CLEC's tariffs or service offerings.

The ALJ found that the Commission lacked the authority to adopt such language. The ALJ's Report states as follows (footnotes omitted):

29. *[This language] provides that the Commission will exercise its regulatory authority only to the extent provided for by these rules. Although not explicitly stated, implicit in that statement is the idea that all other possible regulatory authority which the Commission might exercise (such as other provisions of Chapter 237) will not be exercised. This raises the fundamental question of the Commission's authority to adopt a rule which states that it will not enforce statutes which would otherwise apply to a class of regulated entities.*

\* \* \*

33. *Both the proponents and opponents of the proposed rule have suggested ways in which the rule could be modified.... [Qwest] and the MIC have recommended that the*

*The Commission shall exercise its regulatory authority over the local services provided by CLECs only to the extent provided for in, or necessary to implement the requirements of, Minnesota Statutes, Chapter 237 or this chapter.*

34. *The ultimate power to make a law rests with the legislature. The legislature may define the scope of an agency's regulatory authority, and an agency may not adopt a rule which expands or limits that scope contrary to the statute. Even where a statute is silent, an agency may not add to its powers, or restrict them, by means of a rule.... Interpretive rules do not run afoul of the foregoing restrictions, so long as the agency has been granted statutory authority to adopt the rules (as the Commission clearly has in this case) and so long as the interpretive rules do not expand or restrict the agency's authority as established by statute.*

*It is common for statutes to use general language such as "fair" or "reasonable". It is also common for an agency to adopt a rule which interprets those general words in a more specific way. For example (hypothetically), if the statute said that the rates charged for a local call from a public pay phone must be approved by the Commission and must be "fair", the Commission could adopt a rule which stated that for purposes of that statute, "fair" meant not to exceed 35 cents, or whatever price the Commission decided it wanted to put in the rule. Or, the Commission could adopt a rule which said that for purposes of that statute, "fair" meant a figure not to exceed the result of some formula. But it would not be legal for the Commission to adopt a rule which said that the statute did not apply to certain pay phones in certain kinds of facilities. That kind of a change must be made by the legislature, not by the Commission. If the Commission wants to exempt CLECs from all of Chapter 237, or any other statutory provision, then it must ask the legislature to make that kind of an exemption. The language in the first sentence of subpart 1(A) exceeds the Commission's authority, and cannot be adopted.*

35. *In order to cure the defect created by the language proposed by the Commission, the sentence must be deleted or modified. Perhaps the easiest modification would be to adopt the language proposed by [Qwest].*

In proposing the language at issue, the Commission had not sought to exempt CLECs from any statutory provision. To the extent that the Commission's proposed language was unclear on this point, the Commission will change it.

The Commission is not inclined, however, to adopt the corrective language proposed by Qwest. As noted above, Qwest proposes that the language be modified to say that the Commission would exercise its authority "to the extent provided for in, or necessary to implement the requirements of, Minnesota Statutes, Chapter 237 or this chapter." But if the original language implies that CLECs would be exempt from statutes, Qwest's proposed language would imply that CLECs are exempt from statutes other than those in Chap. 237. The Commission does not intend to make either implication.<sup>1</sup>

CLECs are subject to statutes, period. Nothing in the Commission's rule is intended to imply otherwise. Rather than list all the statutes to which CLECs might be subject, the Commission will simply state this proposition. The language will read as follows:

The commission shall exercise its regulatory authority over the local services provided by CLECs only to the extent provided for in, or necessary to implement the requirements of, all applicable statutes or this chapter.

To ensure clarity, the word "applicable" is included to forestall any suggestion that this corrective language subjects CLECs to statutes that would not otherwise apply to them.

With this final clarification, the Commission will adopt proposed rule 7811/12.2210, subp. 1(A) as modified above.

**B. Definition of "affiliated" (parts 7811/12.2210, subp. 1(B))**

The Commission had proposed to adopt the following language in its rules:

7811/12.2210, COMPETITIVE LOCAL EXCHANGE CARRIERS (CLECs).

Subpart 1 -- General scope of regulation. Competitive local exchange carriers (CLECs) are regulated as provided in this part.

\* \* \*

B. This part applies to a CLEC affiliate of an incumbent local exchange carrier (LEC) only with respect to its operations in geographic areas outside the service area of the affiliated LEC. A CLEC's local service operations inside the service area of its affiliated LEC must be regulated in the same manner as the LEC's local service operations, unless specified otherwise in Minnesota Statutes, chapter 237, or varied as in the public interest by the commission.

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<sup>1</sup>For example, the Commission does not seek to disavow its authority to hear complaints and initiate investigations regarding all "matters within its jurisdiction" pursuant to Minn. Stat. § 216A.05, subd. 5.

The ALJ found that the proposed language was impermissibly vague. The ALJ's Report states as follows (footnotes omitted):

*41. Objectors to proposed Rule 7811/7812.2210, subp. 1(B) also argue that the proposed rule is impermissibly vague because it does not define the term "affiliated." When this problem was raised, the Coalition (including Sprint), urged that the definition appearing at Minn. Stat. § 237.65, subd. 1 (which refers to Section 216B.48, subd. 1) be used. Those definitions include a thorough list of mechanisms for controlling a company which essentially boil down to an ownership interest of five percent or more....*

*42. The Administrative Law Judge finds that the absence of a definition of "affiliated" in the proposed rule does make it impermissibly vague. However, this defect may be cured by adopting the statutory definition outlined by the Coalition.*

The Commission finds the definition stated at Minnesota Statutes § 216B.48, subd. 1 (and referred to at § 237.65, subd. 1) is a reasonable definition for the purposes of this rule. The ALJ has determined that it is needed. Having established the need for and reasonableness of this definition, the Commission will adopt it as part of its rules.

**C. *De minimis* exception (parts 7811/12.2210, subp. 1(B))**

As noted above, the Commission had proposed to adopt the following language in its rules:

7811/12.2210, COMPETITIVE LOCAL EXCHANGE CARRIERS (CLECs).

Subpart 1 -- General scope of regulation. Competitive local exchange carriers (CLECs) are regulated as provided in this part.

\* \* \*

B. This part applies to a CLEC affiliate of an incumbent local exchange carrier (LEC) only with respect to its operations in geographic areas outside the service area of the affiliated LEC. A CLEC's local service operations inside the service area of its affiliated LEC must be regulated in the same manner as the LEC's local service operations, unless specified otherwise in Minnesota Statutes, chapter 237, or varied as in the public interest by the commission.

The Coalition proposed that the Commission modify this language as follows:

~~B. This part applies to a CLEC affiliate of an incumbent local exchange carrier (LEC) only with respect to its operations in geographic areas outside the service area of the affiliated LEC.~~ For a CLEC that is affiliated with an incumbent local exchange carrier (LEC), this part applies to the CLEC's local service operations that satisfy item (1). Otherwise, the local service operations of the affiliated CLEC are subject to item (2).

(1) The local service operations of the CLEC that are either:

(a) in the geographic areas outside the LEC's service area, or

(b) in the LEC's service area but (i) the CLEC's provision of local service in the LEC's service area is identical to the CLEC's provision of local service in other areas of Minnesota, unless any differences are approved by the commission, and (ii) the fraction of the CLEC's lines or local

service revenues (whichever is lower) in the service area where the LEC is the incumbent local carrier in Minnesota is ten percent or less of the CLEC's lines or local service revenues in all areas of Minnesota.

(2) A CLEC's local service operations ~~inside~~ the affiliated LEC's service area of its affiliated LEC must shall be regulated in the same manner as the LEC's local service operations, including the classification of services, unless specified otherwise in Minnesota Statutes, chapter 237, or varied as in the public interest by the commission.

In discussing this language, the ALJ's Report states as follows (footnotes omitted):

*43. ....The Coalition (and Sprint) now advocate that the rule be amended so that a CLEC operating in the territory of an affiliated LEC would be allowed to operate under the relaxed standards if the fraction of the CLEC's operations in the LEC territory is ten percent or less of the CLEC's operations in Minnesota, so long as the services being provided inside and outside of the affiliated territory are identical. The Coalition reasoned that the affiliate relationship would not be a significant consideration in the CLEC's provision of services and there should be no concerns that the CLEC is attempting to abuse its affiliate relationship to provide service in the affiliate ILEC territory. The Coalition did not believe that the CLEC could realistically design its services to take advantage of the affiliate relationship if that affiliate relationship only applies to ten percent or less of its services in the state....*

*44. The Administrative Law Judge finds that the record does contain adequate evidence to support the adoption of the ten percent de minimis provision....*

*45. The Commission is free to either include the ten percent de minimis proposal, or not, as it sees fit....*

The Commission acknowledges that it has the discretion to adopt the proposed *de minimis* standard. Nevertheless, the Commission has declined to adopt it. And the parties have offered no new information to cause the Commission to change its opinion.

As noted in its Post-Hearing Reply Comments (November 13, 2000), the Commission regards the proposed ten percent threshold as arbitrary. Sprint, a chief proponent of this exception, argued that other thresholds might be equally applicable, if not more so.

Moreover, it is unclear how such a standard would be policed. How would the Commission or other parties know when a CLEC was doing more than ten percent of its business in the service area of an affiliated LEC?

Assuming that it could be policed, the exception would create peculiar competitive dynamics, whereby a CLEC's regulatory status could change based on unexpected changes in the number of customers, or usage by customers, either within or beyond the service area of an affiliated LEC.

Finally, to the extent that the Coalition's concerns have merit, a simpler remedy exists: CLECs can simply request a variance of the rule. The Commission has drafted a variance provision directly into this proposed rule for precisely this purpose.

In the absence of new persuasive information or arguments on this proposal, the Commission will decline to change its proposed rules on this basis.

#### **D. All other issues**

The ALJ found that, with respect to all parts of the rules not otherwise noted, the Commission could adopt its proposed language. The ALJ's Report states as follows:

*26. ....The Administrative Law Judge specifically finds that the Commission has demonstrated the need for and reasonableness of provisions of the rules that are not discussed in this Report, that such provisions are within the Commission's statutory authority noted above, and that there are no other problems that prevent their adoption.*

On the basis of the ALJ's Report, the Commission will proceed to adopt its proposed rule amendments.

## **II. STAFF AUTHORIZATION**

Having considered and approved the rule provisions in this docket, the Commission authorizes its Executive Secretary to take the necessary steps to make the provisions effective, including securing the approval of the Office of Administrative Hearings and the Revisor of Statutes and causing the amendments to be published in the *State Register*.

### **ORDER**

1. The Commission adopts the Administrative Law Judge's Report dated December 19, 2000, and incorporates the report into this Order. The report finds that the proposed amendments, reflecting the Commission's decisions in this docket, are needed and reasonable, and that the Commission has adequately fulfilled the notice and procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable law.
2. The Commission modifies proposed part 7811/12.2210, subpart 1(A) by adding the underlined text below:

The commission shall exercise its regulatory authority over the local services provided by CLECs only to the extent provided for in, or necessary to implement the requirements of, all applicable statutes or this chapter. Except as provided otherwise in this part or other commission rules, the commission shall exercise its authority over a CLEC's local services only upon complaint under subpart 17 and will not require prior approval of a CLEC's tariffs or service offerings.

3. The Commission modifies proposed part 7811/12.2210, subpart 1(B) by adding the underlined text below:

This part applies to a CLEC affiliate of an incumbent local exchange carrier (LEC) only with respect to its operations in geographic areas outside the service area of the affiliated LEC. A CLEC's local service operations inside the service area of its affiliated LEC must be regulated in the same manner as the LEC's local service operations, unless specified otherwise in Minnesota Statutes, chapter 237, or varied as in the public interest by the commission. For the purpose of this subpart, the definition of an "affiliated" CLEC and LEC follows the definition of an "affiliated company" in Minnesota Statutes, section 237.65, subdivision 1.

4. The Commission, with a quorum of its members present, adopts the above-captioned rule amendments, in the form set out in the *State Register* on August 21, 2000, with the modifications indicated in its Reply Post-Hearing Comments on November 13, 2000, and this Order, pursuant to authority vested in the Commission at Minnesota Statutes §§ 216A.05, 237.10, and 237.16. The Commission authorizes its Executive Secretary to sign this order, and to take the necessary steps to implement the amendments.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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